NOTES

TO

CLARK ON CONTRACTS

BY

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Notes to Clark on Contracts.

1. *When is a contract by letter complete?* As soon as the offeree *posts* his letter of acceptance, in a reasonable time after the receipt of the offer, provided he has not meanwhile received notice of the revocation of the offer. See *Clark,* 25-27, 33-34, where Massachusetts is mentioned as the only State which holds that an acceptance is not communicated until it is *received* by the offerer. And in Langdell's *Summary of the Law of Contracts* (§§ 12; 14; 180-181), it is contended that, on principle, where the contract is *bilateral* (i. e., a promise for a promise), it is necessary in order to complete the contract that the offerer should receive notice of acceptance; but Prof. Langdell concedes that it is otherwise when the contract is unilateral (i. e., a promise for an act, or an act for a promise), when no notice of acceptance is required.

2. *Can Cooke* v. *Oxley,* 3 Term Rep. (Durnford and East) 653, *be defended on principle?* See *Clark,* 35, note 34. In *Cooke* v. *Oxley,* Oxley agreed to sell specific goods to Cooke on certain terms, and to keep the offer open until 4 o'clock that day. Cooke averred that he did agree to buy within the time allowed, but that Oxley failed to deliver. The court decided in favor of Oxley. The decision has caused much difficulty, and it has been suggested that the case is inaccurately reported. *Boston, etc., R. Co.* v. *Bartlett,* 3 Cush. (Mass.) 224. It seems that the offer remained unrevoked until the return of Cooke, and its acceptance by him, *before 4 o'clock,* and it is now settled law that, while a time offer is revocable at pleasure, yet its acceptance during the time, while it remains unrevoked, makes a binding contract. It is possible that from any point of view the decision was wrong, but it has been attempted to explain the case on the ground that the declaration did not *allege* (though such was the fact) that at the time of the acceptance the offer remained unrevoked. But Prof. Langdell shows that this was

not a necessary allegation by the plaintiff, as the *law would presume* a time offer to continue until the time expires, and it is not necessary in pleading to allege what the law will presume; and if the offer had been revoked, this was a matter to be alleged and proved by the defendant. See Langdell, *Summary of Law of Contracts,* Sec. 182.

3. *What is a sealed instrument now in Virginia?* For the requisites of a seal at common law, see *Clark* 52-53, citing *Pierce* v. *Indseth,* 106 U. S. 546, holding that it is sufficient if an *impression* is made on the paper itself on which the instrument is written, without the intervention of wax or wafer. And see *Jacksonville, etc., R. Co.* v. *Hooper,* 160 U. S. 514, which seems to decide that, even in the absence of statute, a scroll may be a sufficient seal, if it be so intended.

In Virginia it is enacted (Code Va., Sec. 2841) as follows: "Any writing to which a natural person making it shall affix *a scroll by way of seal* shall be of the same force as if it were actually sealed. The impression of a corporate or official seal on paper or parchment alone, shall be as valid as if made on wax or other adhesive substance."

Under this statute, the question arises, When is a scroll affixed "by way of seal"? As to writings under seal for the payment of money (i. e., bonds and covenants as distinguished from deeds of conveyance of land) it is the established doctrine in Virginia that the scroll is not affixed *by way of seal* unless it be acknowledged as a seal in the body of the instrument. Thus in the case of *Clegg* v. *Lemessurier,* 15 Gratt. 108, it was held that a writing for the payment of money, or other purpose for which a deed is not required, though it has a scroll at the foot thereof with the word seal written therein, still cannot be considered in Virginia a sealed instrument, if there be no recognition of the scroll as a seal *in the body of the instrument,* the word "seal" written in the scroll not being in the body of the instrument. This recognition is usually by the words "Witness my hand and seal," above the signature, and thus in the body of the instrument. And it is held that, in the absence of these words, extrinsic evidence is inadmissible to show that in fact the scroll was affixed by way of seal. *Clegg* v. *Lemes-*

surier, supra. Thus in *Gover* v. *Chamberlain,* 83 Va. 286, this instrument was held not under seal: "$507. Waterford, Va., Jan. 1, 1871. One day after date, I promise to pay Samuel A. Gover, or order, the sum of five hundred and seven dollars, value received. S. E. Chamberlain. [Seal.]"

But if the words "witness my hand and seal," or similar words do occur in the body of the instrument, then a scroll following the signature will be sufficient, though the word "seal" is not written therein; and it has recently been held in Virginia that the word "seal" following the signature is also sufficient, though there is no scroll around it. See *Lewis* v. *Overby,* 28 Gratt. 627. As to whether in Virginia the seal of a *corporation* may be a *scroll,* if recognized in the body of the instrument, see 3 Va. Law Reg. 283, note, where it is said that the question has not been decided.

The above doctrine as to the necessity of the recognition in the body of the instrument of a scroll used by way of seal prevails in four or five States besides Virginia (see *Clark,* 53, and n. 22); and even in States where it is not necessary, it is usual to insert the words "witness my hand and seal" above the signature to a sealed instrument. But in most of the States a scroll may be used for a seal without any recognition in the body of the instrument. And even in Virginia an instrument which purports to *convey land* (which conveyance must be by deed) is considered under seal if a scroll be annexed to the grantor's signature, and the instrument be acknowledged by the grantor in order to authenticate it for recordation, although the scroll is not recognized in the body of the instrument. See *Ashwell* v. *Ayres,* 4 Gratt. 283. And the same doctrine is held in West Virginia. See *Smith* v. *Heming,* 10 W. Va. 596.

It had been supposed that the doctrine in Virginia that a *scroll* used by way of seal requires recognition in the body of the instrument (as explained above) had no application to an *actual seal,* and that no recognition of the latter was necessary. But in the recent case of *Bradley Salt Co.* v. *Norfolk, etc., Co.,* 95 Va. 461, it is held that an actual seal, affixed to a contract for the sale of personal property, must be recognized in the body of the contract in order to make it a sealed instrument; and the doctrine is laid down that in Virginia an actual seal requires

recognition in the same cases and in the same manner as does a scroll used *by way of* (as a substitute for) an actual seal. For criticism on this decision, see note by Prof. Lile to the case as reported in 3 Va. Law Reg. 722. For discussion of seals in Virginia, see 1 Va. Law Reg. 622; 3 Id. 282, note by Prof. Burks to *Grubbs* v. *National Life, etc., Co.,* 94 Va. 589.

So far we have considered the case where a scroll is apparent on the face of the writing, and the only question is, whether it was affixed thereto "by way of seal." But a different question is presented when, though there is *full recognition* of the instrument in the body thereof as a sealed instrument by the words "witness my hand and seal," or in the attestation clause it is declared to be "sealed" in the presence of the witnesses—yet on inspection of the instrument neither wax, wafer, scroll, nor any mark of a seal is found upon it. Can such an instrument be deemed under seal? In the recent case of *Reusens* v. *Lawson,* 91 Va. 226, the following language of Judge Parker in *Parks* v. *Hewlett,* 9 Leigh, 518 (taken from Sugden on Powers, p. 236), is *disapproved* by Buchanan, J.: "If in the attestation of an instrument it is stated to have been *sealed* in the presence of witnesses, it will, in the absence of evidence to the contrary, be *presumed* to have been sealed, although no impression appear on the parchment or paper;" the learned judge declaring (at p. 509), "In the absence of other facts, I do not think such a paper as Judge Parker describes could be held in this State to be a sealed instrument." But *on the facts* of *Reusens* v. *Lawson,* it was held that whether a deed offered in evidence had once been sealed (no mark of a seal or scroll appearing on its face) was a *question for the jury.* These facts were thus stated by Buchanan, J.:

"If, however, an original instrument, more than fifty years old, was offered in evidence, and was a good deed in form and substance, except that it lacked the wax, wafer, scroll, or other mark of a seal upon it, purporting to convey land, recognized the seal in the body of the instrument, was attested by witnesses who declared that it was signed, sealed, and delivered in their presence, was acknowledged as a deed before the officers taking the acknowledgment, was stated by the clerk (who certified to the official character of the officers who took the acknowledg-

ment) to be the acknowledgment of a deed, was admitted to record as a deed, the land conveyed by it at once transferred on the land books for the purposes of taxation from the vendor to the vendee (which could not be legally done unless it was a conveyance of the land—Chapter 183, Sec. 30, Rev. Code, 1819), with evidence tending to show the payment of taxes thereon, acts of ownership exercised over and possession taken of part of the land, I think the question whether or not it had been *properly sealed* before its delivery clearly ought to be submitted to a jury. And if, under such circumstances, it would be proper to submit the question to the jury where the original is offered in evidence, is there any good reason, where the original is lost, and a copy offered in evidence, under the same circumstances, why the question of sealing should not also be submitted to the jury? . . . The weight of authority, meager as it is, and the better reason, seem to be in favor of allowing such an instrument to go to the jury, for it to say, upon all the evidence in the cause, whether or not the original instrument was properly sealed. Whether such paper was a sealed or unsealed instrument was formerly treated as a matter of law, to be determined by the court, but seems now considered a question of fact, and is in all cases submitted to the jury. Tayl. Ev., Sec. 149 (old ed. sec. 128), note." See, also, 1 Va. Law Reg., p. 518, note by the editor to *Reusens* v. *Lawson.*

It will be observed that the decision in *Reusens* v. *Lawson* is only to the effect that "under such circumstances," the question whether an original deed, of which a copy was offered in evidence, was under seal should be submitted to the jury. It will require further decisions to show whether the *full array* of facts as recited by the Court is necessary to send the question to the jury, or whether some of them might be absent without changing the result. See the language of Judge Cooley in *Starkweather* v. *Martin,* 28 Mich. 471, quoted in *Reusens* v. *Lawson,* 91 Va. 249.

4. *Can a deed be delivered as an escrow to the grantee or obligee himself? Clark,* 55-6. See Anson on Contracts, p. 53, where the doctrine that a deed cannot be delivered as an escrow to the grantee or obligee is spoken of as the "old rule,"

with an intimation that in England it is not only "old" but obsolete. But the old rule still prevails in most of the States of the Union, and is now the law in Virginia. Thus in *Miller* v. *Fletcher,* 27 Gratt. 403 (21 Am. Rep. 356), it is held that a deed, *perfect on its face,* cannot be delivered as an escrow to the grantee himself. But even in Virginia if on its face the deed is *not perfect,* then it may be delivered to the grantee himself as an escrow. See *Wendlinger* v. *Smith,* 75 Va. 309 (40 Am. Rep. 727). And though a bond is perfect on its face, it may, nevertheless, be delivered as an escrow by a surety who has signed it to the *principal debtor;* for this is not a delivery to the obligee, the creditor. *Nash* v. *Fugate,* 32 Gratt. 595 (34 Am. Rep. 780). But in such cases the surety will be bound if the principal debtor delivers the bond to the obligee, who has *no notice* of the unfulfilled condition. And in *Humphreys* v. *R. Co.,* 88 Va. 43, it is held that a deed, though perfect on its face, may be delivered as an escrow to an officer of a corporation, to take effect on the performance of a condition by the corporation, citing Devlin on Deeds, Sec. 318, where it is said that there is no such personal identity between a corporation and its officers as will prevent a delivery to the latter as an escrow.

5. *What amounts to delivery of a deed? Clark,* 53-4. See the great case of *Doe d. Garnons* v. *Knight,* 5 B. & C. 671, where A having written a mortgage in favor of B (who was not present, and knew nothing of the mortgage until after A's death) brought the mortgage into the presence of his (A's) niece, and signed and sealed it, saying: "I deliver this as my act and deed." Held, this was delivery, though A did not mention B's name, and though he (A) retained the possession of the mortgage, never, at any time, handing it to his niece. And afterwards A brought the same mortgage into the presence of his sister and said: "Take this, it belongs to Mr. B," delivering possession to the sister. Held, that this also amounted to a legal delivery. See this case approved in Virginia in *Skipwith* v. *Cunningham,* 8 Leigh, 271.

6. *What authority must an agent have in order to execute a deed in the name of his principal? Clark,* 56, n. 41. The rule

is that an agent to make a deed must be empowered by deed. "The stream cannot rise higher than its source." So to fill a material blank left in the deed by the principal the agent must have *sealed* authority, for the filling of a material blank is tantamount to making a deed. *Preston* v. *Hull,* 23 Gratt. 600 (14 Am. Rep. 153). Thus in *Preston* v. *Hull,* supra, A, desiring to borrow money, and not knowing who would lend to him on his bond, drew up a bond which he signed and sealed and delivered to his agent B, the bond being perfect except that a blank was left for the name of the as yet unknown obligee; and authorized B verbally to write in as obligee the name of any person who would advance the money. C advanced the money, and B. wrote in C's name, as obligee, and delivered the bond to C. In an action by *C* v. *A* on the bond, it was held not to be the bond of A, because B was not empowered *under seal.* See on whole subject, *Stahl* v. *Berger,* 10 S. & R. (Pa.) 170 (18 Am. Dec. 667-671). And see *Cribben* v. *Deal,* 21 Oreg. 211, denying the doctrine that an agent to make a deed must be empowered by deed.

7. Is Section 4 *of the Statute of Frauds law in the U. S.? Clark,* 64-5. Yes, in all the States. In Virginia it has been re-enacted almost in the same words, with these exceptions: (1) The doctrine of *Wain* v. *Warlters,* 5 East 10 (see *Clark,* pp. 86, 87, and n. 95) has been abrogated, the Virginia Statute (Code Virginia, Sec. 2840) declaring that the consideration need not be set forth or expressed in the writing, and that it may be proved (when consideration is necessary) by other evidence. (2) For the fourth promise of Sec. 4, Statute of Frauds ("or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them"), the Virginia Statute substitutes "upon any contract for the sale of real estate, or for the lease thereof for more than a year," thus avoiding the troublesome question, what is an "interest in or concerning" lands. See Anson, p. (61). The Virginia Statute incorporates the provisions of Lord Tenterden's Act, 9 Geo. 4, c. 14, Sec. 1 (1829), that no action shall be brought "to charge any person upon or by reason of a representation or assurance concerning the character, conduct, credit, ability, trade or deal-

ings of another, to the intent or purpose that such other may obtain thereby credit, money or goods; or to charge any person upon a promise made after full age to pay a debt contracted during infancy; unless such promise, representation or ratification, or some note or memorandum thereof, be in writing, and signed by the party to be charged thereby or his agent." (The English Infants' Relief Act, of 1874, has not been adopted in the United States. See Anson on Contracts, p. 108.) By Code Virginia, Sec. 2922, a new *promise* in writing, or an *acknowledgment* in writing from which a promise to pay may be implied, is required in order to remove the bar of the Statute of Limitations as to money due on an award or by contract.

8. *What is such a promise "to answer for the debt of another" as is required to be in writing signed, by Sec.* 4 *of the Statute of Frauds? Clark,* 66-72. Several requisites must concur: (1) The promise must be made to the *creditor.* A promise to the *debtor* to pay his debt for him is not within the statute; and so, if on valuable consideration, is binding though made verbally. (See *Eastwood* v. *Kenyon,* 11 Ad. & E. 438.) The reason why a promise to save another harmless from the consequences of his acts (Indemnity, Clark, 70), does not require writing is that such promise is made to him who is to *become liable* (the *quasi* debtor), and not to him to whom the liability will be incurred (the *quasi* creditor). In the latter case, writing is required. (2). The promise must be to pay a debt as *guarantor* for which another person is primarily liable. (*Clark,* 67.) Thus in *Hendricks* v. *Robinson,* 56 Miss. 694 (S. C. 31 Am. Rep. 382), the promise of Dulaney to pay Robinson for the goods supplied Hendricks, did not require to be in writing as Hendricks was never *liable at all,* the credit being given entirely and solely to Dulaney, though they were delivered by his order to Hendricks. And the subsequent promise by Hendricks to pay for the goods did require to be in writing; for it was to answer for the *debt of another* (that of Dulaney), and besides it was void for lack of consideration, the only consideration being *moral,* if indeed there was even a moral obligation on Hendricks to pay under the circumstances. (3). The principal liability, while it may be prospective, must be real, i. e., it must

be incurred at *some time*. Thus in *Mountstephen* v. *Lakeman* L. R. 7 H. L. 17, a contractor (the plaintiff) offered to make a side-drain into the main sewer for the defendant if he or the town would be responsible. The defendant said: "Make it and I will see you paid." The town had never authorized the construction of the side-drain, and it refused to assume the liability. It was held that the defendant was liable, without writing, as principal debtor, the words, "I will see you paid" imposing a primary liability on himself. But it was said that even if the defendant's promise had been collateral (e. g., *if the town won't pay you*, I will," etc.), still no writing would have been required. The town was never responsible, but only *himself*. So that his promise could not be to answer for the *debt of another* within the meaning of the Statute of Frauds. *Clark*, 67. (4). The liability of the original debtor *must continue*. Thus in *Goodman* v. *Chase*, 1 B. & Ald. 297, the defendant promised the creditor to pay the debt if the creditor would release the debtor from prison, where he was confined for the debt under a writ of ca. sa. (now abolished). The law was that such release of a debtor operated *ipso facto* to discharge the debtor from his debt. Thus the release of the debtor extinguished his debt and left the defendant alone liable as principal and not for the debt of another. So the defendant was held liable on his promise without writing. *Clark*, 68.

In addition to the above, it has been held in some cases that where the promise to pay the debt of another arises out of some new and original consideration, it is not within the Statute of Frauds. See Smith on Contracts (7th Ed.) 112; *Hopkins* v. *Richardson*, 9 Gratt. 494; *Wright* v. *Smith*, 81 Va. 777. For an examination of this doctrine, see Harriman on Contracts, 197, where various distinctions are suggested. The doctrine is repudiated in England; and see *Noyes* v. *Humphries*, 11 Gratt. 636, at p. 645, *per* Allen, P.

For the doctrine where "the leading object of the promisor is not to become guarantor or surety for the debtor, but to subserve some purpose of his own," see *Clark*, 71.

9. *When is an agreement "not to be performed within the space of one year from the making thereof"? Clark*, 77-82

See *Warner* v. *Texas, etc., R. Co.,* 164 U. S. 418, where the law is thus laid down as stated in the headnote: "The clause of the Statute of Frauds which requires a memorandum in writing of 'any agreement not to be performed within the space of one year from the making thereof,' applies only to agreements which, according to the intention of the parties, as shown by the terms of their contract, cannot be fully performed within a year, and not to an agreement which may be fully performed within the year, although the time of performance is uncertain, and may probably extend, and may have been expected by the parties to extend, and does in fact extend, beyond the year." *Clark,* 78-9 and notes.

The agreement in *Warner* v. *Texas, etc., R. Co.,* supra, was that if Warner would grade the ground for a switch, and put on the ties at a certain point on the railroad, the railroad company would put down the rails, and maintain the switch for Warner's benefit, for shipping purposes, *as long as he needed it.*

The court said (p. 434): "If within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed." See in accord *Richmond, etc., R. Co.* v. *Richmond, etc., R. Co.,* 96 Va. 670.

The case of *Warner* v. *Texas, etc., R. Co.* criticises, and virtually overrules, the case of *Packet Co.* v. *Sickles,* 5 Wall. 580 (cited in *Clark,* 79, n. 60), where the Packet Company agreed to attach a patented contrivance, known as "the Sickles cut-off," to one of its steamboats, and, if it should effect a saving in the consumption of fuel, to use it on that boat "during the continuance of the patent [12 years], if the boat should last so long;" and it was held that the agreement was within the Statute of Frauds on the grounds that it was a "contract not to be performed within the year, subject to a defeasance by the happening of a certain event [the destruction of the boat] which might not occur within that time." But in the *Warner Case,* the construction of the language in the Sickles Case is declared to be, not for 12 years, subject to defeasance on the destruction of

the boat as a condition subsequent, but *until* the lapse of 12 years, or *until* the destruction of the boat, whichever shall first happen, making a double limitation, so that on the happening of *either* event the agreement would be *performed*. The Court says: "The terms 'during the continuance of' and 'last so long' would seem to be precisely equivalent; and the full *performance* of the contract to be *limited* alike by the life of the patent and the life of the boat." It is added: "It is difficult to understand. . . . . how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished, on principle, from a contract to support a man so long as he shall live, which has often been decided, and is generally admitted, not to be within the Statute of Frauds."

Clark's distinction between "terminated" and "performed" (see p. 79) can be better understood by considering whether the contract, terminated or discharged in both cases, is terminated *by* performance or terminated *without* performance. In the language of Harriman (Contracts, p. 202): "A distinction should be drawn between the case of a contract to do something *until* the happening of a certain event, which may happen within the year, and that of a contract to continue for more than one year, but with a proviso that on the happening of a given event, the contract shall be discharged. In the former case there is a limitation, in the latter a condition subsequent." When there is a limitation, the happening of the event terminates the contract *by* performance, so that the case is not within the statute, but when there is a condition subsequent, the non-performance of the condition, or the happening of the event, terminates (or defeats) the contract *without* performance, so that if the contract extends beyond one year the possibility of such defeasance within one year will not take the case out of the statute.

In the application of these principles, there is a preliminary question of construction, in order to decide whether the case involves a limitation or condition. Thus, it is held in England and some of our States, that if a contract is by its terms not to be performed within one year, the fact that either party is given an option to terminate it, on notice, within a year, does not prevent the application of the statute. See *Dobson* v. *Collis,* 1 H.

& N. 81 (cited with approval in *Warner* v. *Texas, etc., R. Co.,* 164 U. S., at p. 430); *Birch* v. *Earl of Liverpool,* 9 B. & C. 392; *Meyer* v. *Roberts,* 46 Ark. 80 (55 Am. Rep. 567). On the other hand, it is laid down by Clark (p. 78) that "contracts which may be terminated at any time on notice" are not within the Statute of Frauds. See cases cited in note 56, and especially *Blake* v. *Voigt,* 134 N. Y. 69. And see the reasoning of the court in *Blake* v. *Voigt,* where a contract for more than one year, terminable upon notice, is treated as a contract to continue *until* the time expires, or *until* notice—making a double limitation. But if the words were "for three years: provided, however, that either party may terminate upon ten days' notice"—the giving of the notice would cause a defeasance, by way of condition subsequent; whereas, if the words were "until the time expires or until notice," this would clearly be a double limitation. The question, then, would seem to depend, as one of construction, upon the *language* of the contract.

In Harriman on Contracts, p. 202, the author says: "Where the contract is to do something for more than one year, but is of a personal character, so that it does not bind the representatives of the promisor, the question arises whether such a contract is within the statute. On principle, it seems that the question is really one of construction; that if the life of the person is to be regarded as marking the limitation of the contract, the statute does not apply; but that if death is to be regarded as a condition subsequent, putting an end to the contract, the statute should apply; and that whether death is to be treated as a limitation or as a condition, should depend on the terms of the contract, and not upon any arbitrary rule. If A promises to do something as long as he lives, A's life marks the natural duration of the obligation; and so if A promises to do something as long as B lives, B's life marks the duration of the obligation. The period of life is uncertain, and may be less than one year; on principle, therefore, the statute should not apply to the cases just put.

"If, however, A promises to do something for a period of five years, the contract is not performed until the five years have elapsed, and A's death, or B's death, if the contract is personal in its character, operates simply as a condition discharging the

contract; *unless the contract be of such a character that it may properly be construed as extending only during the life of A or B.* Thus an agreement by A to work for B for five years is within the statute [see *Lee* v. *Hill,* 87 Va. 497], though death will discharge it; but an agreement by A to support B for five years, or to refrain from doing something for five years, is not within the statute." See *Macgregor* v. *Macgregor,* 21 Q. B. D. 424; *Doyle* v. *Dixon,* 97 Mass. 208; *Seddon* v. *Rosenbaum,* 85 Va. 928; *Thomas* v. *Armstrong,* 86 Va. 323. And see on whole subject, 1 Va. Law Reg. 553, article by Edmund H. Bennett.

10. *Is Section* 17, *Statute of Frauds, in force in Virginia? Clark,* 97. No, it has never been in force in Virginia, nor in West Virginia, Delaware, Illinois, Kentucky, Ohio, Pennsylvania, Rhode Island, or Tennessee; and sales in these States are proved as at common law. For what constitutes at common law an executed sale whereby title passes to the buyer, see *Chapman* v. *Campbell,* 13 Gratt. 105. Where the chattel is specific, and nothing remains to be done to put it into a deliverable shape, the title may pass to the buyer, as by an executed sale, by virtue of an offer and acceptance, of a certain thing at a certain price, though there has been no tender or delivery of the chattel by the seller, and no tender or payment of the price by the buyer. See Graves, "Summary of Personal Property," § 46.

11. *What is consideration sufficient to support a promise? Clark,* 106-110. Langdell (Summary of Contracts, Sec. 45) says: "The consideration for a promise is the thing given or done by the promisee in exchange for the promise." It may also be defined as "Any detriment to the plaintiff incurred at the instance of the defendant, and on the faith of the defendant's promise." Such consideration must move, in the nature of the case, *from the plaintiff* (for why should A sue B because C has conferred a benefit on B, or suffered detriment at B's instance?); but it need not necessarily move *to the defendant.* Of course, if A confers a benefit on B this is both benefit to B and detriment to A (in parting with something of value); but A may suffer detriment at B's instance without benefiting B, as where at B's request, and on B's guaranty, A supplies goods

to C. Here to part with goods on credit is a detriment to A, but C receives the goods, and B may not be at all benefited unless it is by the satisfaction of having done a kindness to C. See Langdell, Section 64.

12. *What constitutes a detriment to the plaintiff (the promisee)? Clark,* 107, 114, 121. It is not necessary that the promisee should suffer any actual injury in order to constitute such "detriment" as amounts to a legal consideration. It is enough that, in exchange for the promise of the promisor, the promisee has *forborne to exercise any legal right,* though its non-exercise may be rather beneficial to the promisee than injurious. The detriment consists in the *restraint* imposed on liberty of action and freedom of will.

Thus in *Hamer* v. *Sidway,* 124 N. Y. 53 (21 Am. St. Rep. 693), an uncle promised his nephew that if the latter would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money, until he should become twenty-one years of age, he, the uncle, would pay him $5,000; it was held that the promise was founded on sufficient consideration, and was therefore enforceable.

13. *Example of consideration consisting in something done by the promisee in exchange for the promise (promise for an act). Clark,* 13-14, 38-40. In *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q. B. (C. A.) 269, the Smoke Ball Co. advertised to pay £100 to any one "who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions." It was added that £1,000 was deposited in the Alliance Bank, "showing our sincerity in the matter." The plaintiff used the smoke ball as required by the directions; and having afterwards contracted the influenza, she sued the Smoke Ball Co. for the £100, and was held entitled to recover. See Anson on Contracts (8th ed.), 45.

14. *If, on agreement with the creditor to receive fifty dollars in full satisfaction of a debt of one hundred dollars, the debtor pays the fifty dollars, is the debt of one hundred dollars thereby discharged? Clark,* 129-130.

No, it is not discharged, at common law, for lack of consideration. See *Clark,* 491-2, *et seq.* And see in accord *Seymour* v. *Goodrich,* 80 Va. 303. The doctrine is now changed in Virginia by statute taking effect May 1, 1888, by which it is enacted (Code, Sec. 2858): "Part performance of an obligation, promise, or undertaking, either before or after breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise or undertaking."

15. *What is "executed" consideration? Clark,* 136-7. According to Anson the consideration of a contract may be *executory* or *executed,* but it cannot be *past.* So Anson distinguishes between an *executed* and a *past* consideration, and denies that the latter is sufficient to support a contract. See Anson, p. (13), note *a,* where it is said: "Executed consideration as opposed to executory means *present* as opposed to future, an act as opposed to a promise." Under this head he places a contract where there is the offer of an act for a promise (completed by the acceptance of the executed consideration), and where there is a promise for an act (consideration executed on request). See p. (90). Under this head would come Smith's case "when the consideration consists in something the benefit of which the person promising has adopted and enjoyed"—where Smith says the law implies both request and promise. (Smith on Contracts, 189.) But Smith's case "where the consideration consists in the person to whom the promise is made being compelled to do that which the person making it ought to have done, and was compellable to do," when also Smith says both promise and request are implied, Anson places under the head of *quasi* contracts, as not being real contract at all. See Anson, p. (366). This leaves of Smith's summary the case "where the consideration consists in the person to whom the promise is made having *voluntarily* done that which the person promising ought to have done, and was legally compellable to do," where the *request* will be implied if the *promise* be express; this Anson rejects as without any real consideration (p. 97). He also rejects the general

doctrine that a *past* consideration will in all cases support an *express* promise if the consideration was *moved by a previous actual request,* and pronounces it unsound except in those cases where "the request is virtually the offer of a promise the precise extent of which is hereafter to be ascertained, or is so clearly made in contemplation of a promise to be given by the maker of the request that a subsequent promise may be regarded as part of the same transaction." (See p. 97.) For Clark's discussion, see 136-142.

16. *Is moral obligation sufficient to support a promise? Clark,* 108-9. No, it has been declared to be "nothing in law." See *Eastwood* v. *Kenyon,* 11 A. & E. 446, cited in *Clark,* 109. In this case, the husband was sued as sole defendant by reason of his express promise, and because he had received the benefit of the plaintiff's expenditures on his wife's real estate. But the plaintiff's expenditures were not made at the wife's nor at the husband's *previous request;* the case therefore did not come within the doctrine of *Lampleigh* v. *Braithwait, Clark,* 138, and the promise was therefore unenforceable. If there had been consideration, however, the promise would have been enforceable without *writing signed by the defendant;* for the promise was made to the *debtor to pay his debt* incurred by him for the expenditures, and so was not within the Statute of Frauds. *Eastwood* v. *Kenyon* is the leading authority for the doctrine that a promise to a debtor to pay his debt is binding without writing if only there be sufficient consideration; but in *Eastwood* v. *Kenyon* there was no consideration. See 8, (1), supra.

17. *Does Anson admit any exceptions to the doctrine laid down by him (p. 89), that consideration may be executory or executed, but it cannot be past? Clark,* 138-142. Yes, on page (100) he recognizes and approves the doctrine that the following promises require no new consideration: (1). Promise by an infant after full age to pay a debt contracted during infancy, not for necessaries; (2). Promise by a bankrupt to pay a debt from which he has been released by a discharge in bankruptcy; (3). Promise by a debtor to pay a debt barred by the Statute of Limitation; (4). Promise by a widow to pay a bond given by her when a married woman and therefore under the disa-

bility of coverture. Anson's reasons for approving these exceptions to the general doctrine that a past consideration will not support a promise, may be seen at pp. (100), (101).

The doctrine is thus laid down in *Eastwood* v. *Kenyon,* supra: "An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise [or on the original express promise] had it not been suspended by some positive rule of law; but can give *no original cause of action,* if the obligation on which it is founded *never could have been enforced at law,* though not barred by any legal maxim or statute provision." To illustrate. In *Hendricks* v. *Robinson,* 56 Miss. 694 (31 Am. Rep. 382), whose facts have been given under 8, (2), supra, the promise of Hendricks to pay for the goods was never enforceable at law, for the goods were not sold to him, and his promise was utterly without consideration. But in the case of infants, bankrupts, and debtors whose debts are *now* barred by the Statute of Limitation, there was originally a binding contract on sufficient consideration, a contract which at the time of the subsequent promise would still be enforceable but for the *positive rule of law,* which, by "legal maxim" of the common law in the case of *infants,* and by "statute provisions" in the cases of *bankrupts* and *debts barred* by lapse of time, denies liability. Anson says (p. 100) that "where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law." This statement by Anson is broad enough to embrace the case of *Lee* v. *Muggeridge,* 5 Taunton 36 (see Anson, p. 100); although the married woman's bond could *never* have been enforced against her (the bond of the married woman at common law being absolutely *void, not voidable* as in the case of an infant); and her promise, therefore, after she became a widow, did not merely revive precedent liability suspended by a positive rule of law, but created an original liability which had no antecedent existence. On this ground, the case of *Lee* v. *Muggeridge,* though not overruled in England, has been questioned there, and has been disapproved of in a number of American cases. See Anson (p. 100), note 1; Smith on Contracts (p.

189), note 1 at end. And see especially the opinions in *Goulding* v. *Davidson,* 26 N. Y. 604, where, however, the doctrine of *Lee* v. *Muggeridge* was followed by the court. For Clark's discussion, see pp. 138-142. As to *Lee* v. *Muggeridge,* see *Clark,* 137, n. 145; 141, n. 165.

18. *Is an infant's contract valid, void, or voidable?* See *Clark,* 149-154. In 1 Am. Leading Cas., p. 280, in valuable note to *Tucker* v. *Moreland,* 10 *Peters* 58, it is said: "The numerous decisions in this country justify the settlement of the following definite rule that is subject to no exception: (1) The only contract binding on an infant [i. e. valid] is the implied contract for necessaries; (2) the only act which he is under a legal incapacity to perform [i. e. void] is the appointment of an attorney or other agent; (3) all other acts or contracts, executed or executory, are voidable or affirmable by him after full age at his election [i. e. voidable]." This rule is quoted with approval in *Mustard* v. *Wohlford,* 15 Gratt. 337.

In the recent case of *Dellinger* v. *Foltz,* 93 Va. 729, the court adopts the doctrine stated above that the appointment of an attorney or other agent by an infant is not merely voidable but void. It is there said, by way of *dictum,* however, that it is "well settled that an infant cannot empower an agent or attorney to act for him, and that such appointment would be void. Nor can he affirm what one has assumed to do for him, for he cannot ratify what he could not authorize." But the soundness of this doctrine has been denied in some cases, and on principle it would seem that there should be only two classes of contracts by infants, viz.: (1) those which are valid, (2) those which are voidable; thus enabling him to affirm the latter class, if after full age he should deem them beneficial. For discussion, see monographic note to *Craig* v. *Van Bebber* (Mo.), 18 Am. St. Rep. 574; and especially 3 Va. Law Reg. 610, note by Prof. Lile, citing late case of *Coursolle* v. *Weyerhauser* (Minn.), 72 N. W. 697, holding that a power of attorney by an infant to convey his land was voidable and not void, and so capable of ratification by him after full age.

Under the head of valid contracts, Clark (pp. 151-2) adds to the implied contract for necessaries, the following as binding upon an infant.

(*a*) Quasi contracts—*created* by law.

(*b*) Contracts under authority of statute—*authorized* by law.

(*c*) Contracts to do what infant is legally bound to do—*compellable* by law.

(*d*) Executed contract where other party cannot be put *in statu quo*—some jurisdictions—conflict.

19. *What are the consequences of the avoidance by an infant of his contract? Clark,* 171-174. For clearness of view, consider these four cases:

1. When infant sells his property on credit, and receives the adult's note for the price, or other promise to pay. Then if the infant avoids the contract, the action is by *I.* v. *A.* to recover I.'s property. I. can recover, of course, for the sale is voidable by infant, and as he has received nothing from A., there is no question of restitution by I., unless it be to surrender A.'s note for the price.

2. When infant sells property to adult for cash, and receives the purchase money. Action by *I.* v. *A.* to recover his property. I. can recover, of course, on the return of the purchase money; for the contract is voidable by the infant. But suppose during infancy I. has squandered purchase money, can he still recover his property, making no restitution to adult? The better opinion is that I. can recover *without restitution.* For otherwise the policy of the law as to the incompetency of infants to bind themselves by a sale of their property would be frustrated. For if the infant could not recover his property without returning purchase money squandered during infancy, the right to avoid would be futile; for the infant would be obliged to mortgage his property to its value, or sell it when recovered, in order to repay the purchase money to him who bought from infant during infancy.

3. When infant buys property from adult on credit and gives adult note for the price. It is here supposed that the contract is not for necessaries, for otherwise the infant would be bound on his *implied* contract to pay what the necessaries were worth (*quantum valebant*). But when the purchase is not of necessaries, if action be brought by *A.* v. *I.,* on note after infant has reached full age, I. can *plead infancy,* and thus avoid paying for

the property, unless I. has, after full age, signed a written promise to pay the debt, or *ratified his promise* in writing, as there is no "Infants' Relief Act" in the United States. But if infant still has property and would avoid his liability to pay for it, he must return it to adult; for it is a settled rule that an infant cannot be permitted to retain property purchased by him, and still in his possession, and at the same time repudiate the contract on which he received it. But where the property cannot be returned because wasted or consumed by the infant *during infancy,* then the right of the infant is settled to plead infancy, and avoid payment, leaving the seller to bear the loss. This is the ordinary case where a foolish tradesman sells an infant goods not necessaries on credit, and has nothing to rely on but the honor of the infant.

4. Where the infant buys property (not necessaries) from adult, and pays cash for it. It will be seen that the adult has nothing to ask; he cannot avoid; he has received payment, and has nothing to sue for. But the action is by *I.* v. *A.* to recover back his money. Certainly I. can do so, if he can return the property; for the contract is voidable. But suppose the infant has not the property, can he recover his purchase money without placing the adult in *statu quo?* Upon this point the cases are in conflict, the weight of modern authority, at least in the United States, favoring the absolute right of the infant to recover his money, with restitution to adult when practicable, and without it when it is not. See *Clark,* 173-4, *Lemmon* v. *Beeman,* 45 Ohio St. 505; *Morse* v. *Ely,* 154 Mass. 458; note to *Craig* v. *Van Bebber,* 18 Am. St. Rep. 574.

It is believed, however, that the better view is, in accordance with the English decisions, and some of the American, that unless the infant can return the property he cannot recover the purchase money. See cases cited by Clark, p. 174, n. 151, and especially *Adams* v. *Beall,* 67 Md. 53 (1 Am. St. Rep. 379). Usually the infant cannot return the property; so that if this view be correct, the wise tradesman who sells to an infant for cash, need have little fear of avoidance; and if it comes, it is coupled with restitution which robs it of its terrors.

Compare these two cases.

1. Infant *sells* property, and *receives money.*

2. Infant *buys* property, and *pays money.*

In each case, the contract is *executed* on both sides. But under (1) the infant can *recover back his property,* and this without restitution, unless the purchase money remains in his possession; whereas under (2) unless infant can return property, the better opinion is that he cannot *recover money.*

The distinction is thus explained by Prof. J. Randolph Tucker: When infant *sells* his property, the buyer takes a *defeasible title,* and nothing can prevent infant's right to recover; when infant *buys* property, it is *money* he seeks to recover, and he cannot recover it except in *assumpsit,* not as property, but as money. But unless the infant retain the property bought, and tender a return, there is nothing to raise an *assumpsit.* It involves no question of defeasible title, but of obligation to repay, and such obligation will not be implied, even for the infant, unless *ex æquo et bono* the adult should not retain the money paid, as in case of fraud, where infant has given his money for nothing. But under (1), though what the infant retains the law raises a duty against him to return, when he repudiates the sale, and reclaims his property, yet the law will not raise an *assumpsit* against him to return the purchase money which he received as infant, if he has wasted it during infancy on account of the very incompetency which the law attributes to him.

20. *How may an infant ratify his voidable contract in Virginia? Clark,* 166-9. By C. V. 2840: "No action shall be brought . . . to charge any person upon a promise made, after full age, to pay a debt contracted during infancy, or upon a ratification, after full age, of a promise or simple contract made during infancy, . . . unless the promise . . . or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged thereby, or his agent."

For discussion of the construction of this rather crabbed statute, see 5 Va. Law Reg. 267, note by Prof. Lile. His conclusions are as follows:

1. A new *express* promise, after full age, to pay a *debt* contracted during infancy, must be in writing. *Ward* v. *Scherer,* 96 Va. 318 (31 S. E. 518).

2. A new *express* promise, after full age, to perform a contract made during infancy not in the nature of a debt [e. g. a contract to do a collateral thing such as to sell goods or perform services], need not be in writing.

3. *An implied* promise [i. e. *language* from which a promise may be implied], after full age, to perform *any* contract made during infancy, must be in writing.

4. Any conduct after full age (other than by words) indicating an unequivocal intention on the part of the infant to ratify a contract made during infancy, subsequent repudiation of which would operate as a fraud upon the other contracting party, will amount to a ratification without a writing.

5. When the infant, after age, becomes *plaintiff* to recover the consideration paid on a contract made during infancy, a ratification may be shown as at common law. The statute applies only where the infant is the "party to be charged"—that is, the defendant. *Hilton* v. *Shepherd* (Me.), 42 Atl. 387.

The mode of ratification of an infant's contract prescribed by the Virginia statute is substantially the same as that required in England by Lord Tenterden's Act, 9 Geo. IV. c. 14 (1829). This act has now been repealed (Statute Law Revised Act, 1875), having been rendered unnecessary by the Infants' Relief Act of 1874—to which reference has already been made. This act, says Anson, "appears to have been designed not merely against the results of youthful inexperience, but against the consequences of honorable scruples as to the disclaimer of contracts upon the attainment of majority." Its provisions are as follows (8th ed., 234):

1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of the common law or equity, enter, except such as now by law are voidable."

2. "No action shall be brought whereby to charge any person

upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

No such legislation as the above has been adopted in the United States, and adults may ratify their voidable contracts made during infancy; but by the weight of authority, such ratification is not binding if it was made in ignorance of the legal right to repudiate the contract. See 4 Va. Law Reg. 623, note by Prof. Lile, commenting on *Bestor* v. *Hickey* (Conn.), 41 Atl. 555, where the contrary was held. As to an infant's liability for fraudulent representation as to age, see 2 Va. Law Reg. 466, note by Prof. Lile; also Ibid, p. 724, article by Mr. David H. Leake.

21. *What is mistake as to the nature of the transaction?* See *Clark,* 196-8, citing the great case of *Foster* v. *Mackinnon,* L. R. 4 C. P. 704, where a man signed an endorsement of a bill of exchange under the impression that it was only a common law guaranty. Here there was no intention at all to sign an *endorsement.* The same doctrine is applicable to cases of *fraud,* as where a man is asked for his autograph, and by a trick his name is obtained to a deed or other contract. In this case the *will does not go with the deed,* the fraud is said to be *in the factum,* and if the party deceived is sued on the deed he can plead *non est factum,* i. e., *not his deed.* But fraud in the *factum* must be distinguished from *fraud in the inducement,* where the signer intends to sign what he does sign, but is led to do so by false statements; where the *will goes with the deed,* but is led so to do by deceitful inducements. In this class of cases the contract or deed is not *void* but *voidable* only. (See *Clark,* 238-9). The consequence is that if A sells property to B, meaning so to do, but relying on B's false statements as the inducement to the sale, B, nevertheless, by the *act* and *will* of A, gets the *legal title* to the property, which remains in B until avoidance of the sale by A. If in the meantime, i. e., before avoidance by A, B sells the property to C, for value and without notice of B's fraud, C gets a good title as against A, who must

look to B alone for damages. For B *has title* to the property, and since C receives it from B, C is secure both at law and in equity; for what can be alleged against the holder of the *legal title,* who receives it with clean hands, and for valuable consideration?

Thus in *Moyce* v. *Newington,* 4 Q. B. D. 32, B purchased and obtained delivery of certain sheep from A by giving A a fictitious check. Before A had done anything to avoid the contract with B, B sold the sheep to C, who bought them *bona fide* and for value. It was held that A was not entitled to take away the sheep from C (as A had done), but was liable to an action by C for so doing. Here B had gotten title from A, and so C had gotten title from B. But contrast *Moyce* v. *Newington* with *Cundy* v. *Lindsay,* 3 App. Cas. 459, where a sharper named Blenkarn took a room at No. 37 Wood St., London, on which street, at No. 123, there was the respectable firm of Blenkiron & Sons. Blenkarn then ordered 250 dozen cambric handkerchiefs from Lindsay & Co., of Belfast, who supplied the handkerchiefs under the impression that they were selling to Blenkiron & Sons, Blenkarn having, with fraudulent purpose, so written "Blenkarn & Co." as to make it look like "Blenkiron & Co." (that concern being known to Lindsay & Co.). Blenkarn sold the handkerchiefs to Cundy, who bought for value, without notice of the fraud. In an action by Lindsay against Cundy, it was held that no title had ever passed to Blenkarn, who, therefore, could give none to Cundy. Hence Lindsay & Co. were entitled to recover the handkerchiefs. Lindsay & Co. never meant to sell them to Blenkarn, and Blenkiron & Sons, to whom they did mean to sell, never meant to buy them; hence there had never been a sale at all.

22. *Is a mistake as to the existence of a right a mistake of law, and so without remedy?* See *Clark,* 206, n. 44, citing *Cooper* v. *Phibbs,* L. R. 2 H. L. 170. The true doctrine is, as stated by Lord Westbury, that a "private right of ownership is a matter of fact (though) it may be the result also of matter of law." On the difficult question, "What mistakes are, and what are not, ground for relief?" Prof. Pomeroy (2 Pom. Equity, Secs. 843-'49) offers the following rules:

Rule I. When the parties *with knowledge of the facts,* and without any inequitable incidents, as fraud, concealment, misrepresentation, undue influence, violation of confidence, etc., have made an agreement or other instrument *as they intended it should* be, and the writing expresses the transaction as it was understood and designed to be made, then equity will not grant relief, although one of the parties (or, as many cases hold, both of them) have mistaken its legal meaning, scope and effect. An example under this rule is found in the celebrated case of *Hunt* v. *Rousmaniere's Adm'rs,* 8 Wheaton, 174. (S. C. 1 Peters 1.) In that case a power of attorney to execute a bill of sale of a ship was taken by a creditor from a debtor under the distinct impression, induced by the advice of counsel, that it would be as valid a security, under *all* circumstances, as a mortgage. The debtor subsequently died, and as the power of attorney was revoked by his death, the security of the creditor was invalidated. But it was held (in strict conformity, it will be seen, with Rule I, supra) that the misapprehension of the parties as to the legal effect of the instrument was not ground for relief, even in equity, and of course it would not be at common law. (See Bispham's Equity, Sec. 187.)

Rule II. But when a person is ignorant or mistaken as to his own antecedent or existing legal rights, interests, estates, duties, liabilities or other relations, either of property or contract, or personal *status,* and enters into some transaction, the legal effect and scope of which he correctly understands with reference to such rights, etc., but which transaction he would never have entered into if he had known the nature and extent of his rights, etc., then equity will grant relief, treating the mistake as analogous to, if not identical with, a mistake of fact. An example under this second rule is *Bingham* v. *Bingham,* 1 Vesey, Sr., 126, where the defendant sold to the plaintiff an estate which in fact belonged to the plaintiff already, but which both parties believed, under a mistake caused by a misconception of law, to belong to the defendant. Relief was granted in equity, and return of the purchase money was decreed. See Adams' Eq. 190. And in *Lansdown* v. *Lansdown,* Mosley, 364, where the eldest of three brothers divided land, of which the second brother had died seised, with a younger brother under the mistaken impres-

sion that the latter and not himself was heir at law to the second brother, it was held that he was entitled to relief in equity, and his conveyance to the younger brother was set aside. It will be seen that the elder brother correctly understood the nature and effect of his conveyance to his younger brother, but he never would have made it if he had not been ignorant of the nature and extent of his own existing rights in the property. So his mistake was one of *private right* and not of *general law,* which distinguishes the case from *Hunt* v. *Rousmaniere's Adm'rs,* supra. See *Zollman* v. *Moore,* 21 Gratt. 313, criticised in 2 Pom. Equity, note to Sec. 849.

23. *What is the practical test by which to distinguish fraud from innocent misrepresentation?* See *Clark,* 209, where the answer is that "fraud gives rise to an action *ex delicto,* while innocent misrepresentation does not. Fraud, besides being a vitiating element in contract, is a tort or wrong apart from contract, and may be treated as such by bringing an action of deceit. Misrepresentation in exceptional cases may *invalidate* a *contract,* but will not support an action of deceit." A good example of innocent misrepresentation is found in *Grim* v. *Byrd,* 32 Gratt. 293, where Grim, induced so to do by an innocent misrepresentation, conveyed to Byrd a parcel of land and the mill thereon, known as "Craney Island Mills," in consideration of twenty shares of stock of the Rawley Springs Co. Rescission was decreed and the court held "that a false [i. e. unfounded] representation of a material fact, constituting an inducement to the contract on which the purchaser had the right to rely [and did rely], is a ground for a rescission by a court of equity, although the party making the representation was ignorant whether it was true or false [i. e. though it was not *fraudulently* made, and though no action *could be brought to recover damages* on the ground of fraud]."

Grim v. *Byrd* has been followed in numerous cases in Virginia. And it is also held, under C. V. § 3299, allowing certain equitable defences to be made at law, that the defendant when sued in an action at law can defend himself by a special plea, verified by affidavit, that he was induced to enter into the contract by misrepresentations of material facts; and the plea is good without

any allegation that the plaintiff *knew* that the allegations were false. See *Guarantee Co.* v. *National Bank,* 95 Va. 480, where it is said by Judge Riely (at p. 491), speaking of misrepresentations of fact: "it was immaterial whether the plaintiff knew that they were false, or honestly believed them to be true. If a party innocently misrepresents a material fact by mistake, the effect is the same on the party who is misled by it as if he who innocently made the misrepresentation knew it to be positively false. The real question in such a case is not what the party making the representation knew or believed, but was the representation false [i. e. unfounded in fact], and was the other party misled by it." To this proposition are cited (besides *Grim* v. *Byrd*) *Lynchburg Fire, etc., Co.* v. *West,* 76 Va. 575; *Wilson* v. *Carpenter,* 91 Va. 183; *Max Meadows, etc., Co.* v. *Brady,* 92 Va. 77. To the same effect are *Orr* v. *Goodloe,* 93 Va. 263; *Wren* v. *Moncure,* 95 Va. 369, and other cases.

But it must be remembered that in none of these cases of *innocent* misrepresentation was an action at law brought for *damages* by reason of *fraud.* They were suits in equity for rescission, or actions upon contract where the defendant relied on the misrepresentation as a defence. For the requisites to enable the plaintiff to recover damage for fraud, see the next note.

24. *What is necessary to constitute fraud for which an action for deceit will lie to recover damages?* See *Clark,* 229-230, where it is said, quoting from Lord Cairns: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted what they *knew* to be untrue." But this language of Lord Cairns is criticised in the great case of *Derry* v. *Peek,* L. R. 14 App. Cas. 337 (decided in 1889), where it is said by Lord Herschell: "This must mean that the persons referred to were *conscious* when making the assertion that they were ignorant whether it was true or untrue, for if not, it might be said of any one who innocently makes a false statement. He must be ignorant that it is *untrue,* for otherwise he would not make it innocently. He must be ignorant that it is true, for by the hypothesis it is false."

But when the defendant asserts a fact to exist, or not to exist, when he is *conscious that he has no knowledge* on the subject, his statement if false is also *fraudulent;* for he *affirms* knowledge when he is conscious of ignorance. He says he knows when he *knows* that he does *not* know, which is clearly moral fraud, and when it works an injury is a sufficient *scienter* to support an action for deceit. But *Derry* v. *Peek,* supra, holds that (except in a few anomalous cases where a man is bound to know the facts, and therefore the *scienter* is presumed) a statement can never be fraudulent if made by the defendant *with an honest belief* in its truth, and that this is so though the statement is made *carelessly* and without reasonable ground to believe it true, so long as the judge or jury believe it was made *bona fide.* It is said in *Derry* v. *Peek* that "the authorities establish the following propositions: *First.* In order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. *Secondly.* Fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."

The doctrine of *Derry* v. *Peek* that a false statement made through carelessness, and without reasonable ground for believing it to be true, may be *evidence* of fraud, but does not necessarily amount to fraud, has been changed in England, as to Directors of Companies, by the "Directors' Liability Act, 1890." Some of the recent American cases adopt, others reject the doctrine. See 14 Harvard Law Review, 184. For cases, and further discussion, see hereafter under "Torts."

25. *Does a penalty always imply prohibition?* See *Clark* 261, *et seq.* In *Bartlett* v. *Viner,* Carthew 252, it was said by Lord Holt: "Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a *void contract,* though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a *penalty implies a prohibition,* though there are no prohibitory words in the statute." But in *Harris* v. *Runnels,* 12 How. 79, whether a contract to do an act penalized by statute is to be treated as *void* or not, is said to depend, in all cases, on the *legislative in-*

tent, to be collected from all the circumstances of the case, the presumption being *prima facie* that such contract is void unless the contrary appears to be the true meaning of the statute. Thus in *Harris* v. *Runnels,* supra, an action was brought for the price of certain slaves, and as a defense it was pleaded that no certificate had been obtained, previous to bringing the slaves into the State of Mississippi, showing that they had not been guilty of any crime, etc., as was required by a law of that State, which imposed a fine of $100 for every slave so purchased and brought in. But the court held that the plea was bad, as on the true construction of the statute the penalty was not intended to avoid the contract. So in *Niemeyer* v. *Wright,* 75 Va. 239, it was held, citing *Harris* v. *Runnels,* that the Virginia statute, which requires under heavy penalty, certain things to be done by persons selling commercial fertilizers (labels expressing the component parts of such fertilizers, etc.) was not intended to avoid the contract for such sale for failure to comply with its provisions. The seller recovered on the contract in an action at law, though he had not complied with the directions of the statute; it being said that the mere imposition of a penalty for doing or omitting to do an act, does not of itself, in every case, necessarily imply an intention of the legislature that every contract in contravention of the statute shall be void, in the sense that it is not to be enforced in a court of justice.

26. *Are arrangements to purchase property on joint account at an auction sale valid? Clark* 258. See *Barnes* v. *Morrison* (97 Va. 372), 5 Va. Law Reg. 373, where the cases are examined, and the law thus declared, as stated in the head-note: "Where property is to be sold at auction, and especially at a judicial sale, or at a sale in the course of govenmental administration, a secret combination and agreement amongst persons interested in bidding to refrain from bidding, in order to prevent competition and to lower the selling price of the property, is illegal. But it is not necessarily corrupt for two or more persons to agree that one of them shall purchase for their joint benefit property sold at a judicial or other public sale. Whether such a combination is lawful or otherwise depends upon the intention of the parties, and the effect of the arrangement as as-

certained from the evidence in each particular case." And see editorial note on *Barnes* v. *Morrison*, by Prof. Lile, 5 Va. Law Reg. 414, where it is said: "The real test in such cases seems to be whether the combination was entered into *bona fide* to carry out some particular and lawful end desired by the participants, or to accommodate the peculiar circumstances, financial or otherwise, of the parties. If so, even though the effect may have been to depress the bidding, the motive being a lawful one, the transaction will be sanctioned as lawful."

For a recent case by the Supreme Court of the United States, declaring illegal a combination between two contractors in putting in bids for the construction of public works, see *McMullen* v. *Hoffman*, 174 U. S. 639.

In *Camp* v. *Bruce*, 96 Va. 521, it is held that a purchaser at a judicial sale cannot, before confirmation, sell his bargain to another at an advance price. The court said: "We have no statute declaring that contracts like the one under consideration are unlawful, yet under the principles of the common law, any contract that is made for the purpose of, or whose necessary effect or tendency is, to lessen competition and restrain bidding at judicial sales, is held to be illegal, because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law, therefore, is to secure such sale from every kind of improper influence. To allow one bidder to buy off another, which is but a species of bribery, and thus prevent the property from bringing the best price [by an upset bid and a resale] is condemned by the law; and the courts will not enforce contracts founded in such practices."

As to the effect of illegality, the court said: "The law refuses to enforce illegal contracts as a rule, not out of regard for the party objecting, nor from any wish to protect his interest, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings, or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it, or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation."

27. *Contracts in violation of Sunday Laws.* See *Clark* 265-270. The Virginia Statute, Code, Sec. 3799, as amended by Va. Acts 1908, c. 180, is as follows: "If any person on the Sabbath day be found laboring at any trade or calling, or employ his apprentices or servants in labor, or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $5 for each offence. Every day any person or servant or apprentice is so employed, shall constitute a distinct offence, and the Court in which or the justice by whom any judgment of conviction is rendered, may require of the person so convicted a recognizance in a penalty of not less than $100 nor more than $5,000, with or without security, conditioned that such person shall be of good behavior, and especially to refrain from a repetition of such offence, for a period not exceeding 12 months." See Sec. 3800 for exceptions as to Jews who observe the seventh day of the week. See also Sec. 3801, forbidding transportation of freight by railroads on Sunday, which has been declared constitutional by the Virginia Court of Appeals, even as to freight trains engaged in interstate commerce. See *Norfolk, etc., R. Co.* v. *Com. of Virginia,* 93 Va. 749 (decided June 11, 1896), overruling *Norfolk, etc., R. Co.* v. *Commonwealth,* 88 Va. 95. See also *Hennington* v. *State of Georgia,* 163 U. S. 299, declaring a similar statute of the State of Georgia constitutional, in the absence of any Act of Congress governing the subject. But see now Va. Acts 1910, p. 59, c. 42, permitting trains to be run on Sunday through the State of Virginia, without stopping at local stations for interchange of freight, where such trains constitute interstate freight trains exclusively. See also Acts 1910, p. 471, c. 310.

28. *Usurious Contracts.* See *Clark* 270. The usury laws were abolished in England by 17 and 18 Vict. c. 90 (1855). But such laws are in force in most of the United States. The present Virginia Statute (in force since 1874) is as follows (Code, Sec. 2817): "Legal interest shall continue to be at the rate of six dollars on one hundred dollars for a year, and proportionally for a greater or less sum, or for a longer or shorter time; and no person upon any contract shall take for the loan

or forbearance of money or other thing above the value of such rate." And by section 2818 it is declared that all contracts, etc., violating the preceding section "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne." The effect of this is that if the lender of money contracts for over six per cent. interest, he can collect only the bare principal without any interest. But this does not apply to the holder of a negotiable note who has bought it for value without notice of the usury; and such holder can recover six per cent. interest of the maker, though the payee had contracted for over six per cent.; for the note is not void as to the interest, but is "deemed to be for an illegal consideration," which renders it *voidable* only, as to the excess of interest; and a defence which renders a negotiable instrument *voidable,* is unavailing against a holder for value without notice. See *Lynchburg National Bank* v. *Scott,* 91 Va. 652. For the effect of a statute declaring a usurious contract *void,* as distinguished from *illegal,* see *Clark,* 270, and cases cited in *Lynchburg National Bank* v. *Scott,* supra.

29. *What is the status of wagering contracts? Clark* 275-7. By 8 and 9 Vict. c. 109: "All contracts and agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." In Virginia by Code, Sec. 2836, "Every contract, conveyance or assurance, of which the consideration, or any part thereof, is money, property or other thing, won or bet at any game, sport, pastime or wager, or money lent or advanced at the time of any gaming or betting or wagering to be used in being so bet or wagered (when the person lending it or advancing it knows that it is to be so used) shall be *void.*" For recovery of money or property lost at gaming ($7.00 or more lost in 24 hours, or property of that value), see Code, Sec. 2837, which to this extent sets aside the maxim *in pari delicto portior est conditio defendentis aut possidentis.* See also Code Va. Sec. 2838-'39. It must be remembered that at Common Law wagers are valid unless, (1) against public policy, as bets on an election, or on the acquittal of a prisoner, etc.; or (2) injurious to private character or feelings, as a bet on the sex of a person who wore man's clothing (celebrated case of *Da Costa* v. *Jones,* Cowper.

729, as to the sex of the Chevalier D'Eon), or as to whether an unmarried woman would have a child by a certain day, etc. *Dichurn* v. *Goldsmith,* 4 Camp. 152.

30. *What are lobbing contracts? Clark,* 285-6. See *Trist* v. *Child,* 21 Wall. 441, where a contract to pay a lawyer for getting a special act through Congress, appropriating money to satisfy a claim, was held void by the Supreme Court of the United States, as contemplating the procuring of legislation by lobbying services. The nature of such services is indicated by this extract from a letter written by the lawyer to his client: "Please write to your friends to write to any member of Congress; every vote tells and a simple request may procure a vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote." But the court said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, expressed or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character."

And see Code Virginia, Sec. 3746-'7, which punish as a misdemeanor "lobbying with the General Assembly;" but by Sec. 3748 the two preceding sections "shall not apply to any person who may be invited by or have the permission of any regular or special committee of the General Assembly to appear before it, either for or against any measure." See *Clark,* 286.

31. *When is a compromise of a prosecution permissible?* See *Clark,* 292-3. The test in the English case (*Keir* v. *Leeman,* 6 Q. B. 321), mentioned on page 294, that a compromise is lawful where civil and criminal remedies co-exist (i. e., where the injured party can *sue* for damages as well as *prosecute* for the crime) can hardly be applicable now in Virginia, where it is provided by statute that "the commission of a felony shall not stay or merge any civil remedy" (Code, § 3884); and where the personal representative of a person whose death is caused by the "wrongful act, neglect or default, of another," can sue that other for damages, although the death may have been caused "under such

circumstances as amount in law to a felony." Code Virginia, § 2902; *Matthews* v. *Warner's Admr.*, 29 Gratt. 570. It is believed that prosecutions can be compromised for *misdemeanors* only, not for felonies, and for such misdemeanors only as are considered to affect mainly the individual prosecuting. Thus, an *indictment for assault* may be compromised at common law, provided the offence is confined to personal injury, and is not accompanied by riot, or obstruction of a public officer in the execution of his duty. See *Keir* v. *Leeman,* supra. The Virginia Statute enacts as follows (Code, Sec. 3973): "When a person is in jail or under recognizance to answer a charge of assault and battery or other misdemeanor for which there is remedy by civil action, unless the offence was committed by or upon a sheriff or other officer of justice, or riotously, or with intent to commit a felony, if the party injured appear before the judge or justice who made the commitment or took the recognizance, and acknowledged in writing that he has received satisfaction for the injury, such judge or justice, in his discretion, may, by an order under his hand, supersede the commitment or discharge the recognizance as the accused and witnesses."

32. *What is the status of maintenance and champerty in the United States? Clark,* 296. For full discussion, see monographic note to *Thallhimer* v. *Brinckerhoff,* 3 Cowen (N. Y.) 683 (S. C. 15 Am. Dec. 308). It is there said that the States of the Union may be divided as to maintenance and champerty in three classes. (1) In a few States there is no such thing as champerty or maintenance. This is said to be the case in California and Texas, and their existence is doubtful in Vermont, Connecticut and Missouri. (2) In a second class of States, the strict English rule is in force, and it is champerty for a lawyer to agree to carry on a law suit for a share of the proceeds as his compensation for services, even though he is to make no disbursements and the client undertakes to pay the expenses and costs. This rule is said to exist in Kentucky, Indiana, Ohio, Michigan, Rhode Island, and Massachusetts. (3) A third group of States have adopted a middle rule by which, although the lawyer is to be paid for his services out of the proceeds, still it is not champerty unless he also agrees to bear the expenses and costs.

This modified rule is said to exist in New Jersey, Illinois, Wisconsin, Mississippi, Tennessee, Georgia, Iowa and North Carolina. It certainly exists in the Supreme Court of the United States, and in Virginia. See *Wright* v. *Tibbetts,* 91 U. S. 252. In *Nickels* v. *Kane's Administrator,* 82 Va. 309, it was held that champerty is a bargain for a portion of the matter sued for, by which the champertor undertakes to carry on the suit *at his own expense,* but that it is not champerty where the attorney does not agree to pay the expenses of the suit; and that where the defendant agreed with an attorney to pay him ten per cent. of the amount by which he should succeed in getting a certain decree reduced, but the attorney did not undertake to bear the costs, it was not champerty, but a valid, enforceable contract.

As to Vermont, the existence of champerty in that State was doubtful, as is stated above; but in the recent case of *Hamilton* v. *Gray,* 67 Vt. 233, champerty is recognized as at common law.

33. *What is a marriage brocage (or brokerage) contract?* See *Clark* 302-4. An example is found in *Johnson* v. *Hunt,* 81 Ky. 321, where in defence to an action on a promissory note it was pleaded by the maker that he had undertaken to assist his grandfather, the payee of the note (an old man aged 77), in getting married, and had written letters to a young lady on his behalf, etc., and that as compensation for such services the grandfather had agreed to release and give up the note in controversy. *Held,* that the defence was bad, as it clearly showed a marriage brocage contract, the grandson (the defendant) undertaking to aid in bringing about a marriage in consideration of the surrender by his grandfather of the note for $5,000.

34. *What is the present status in England and the United States of contracts in restraint of trade? Clark,* 305-311. It was formerly thought that the rule that the restraint must be *reasonable,* always forbade contracts where the restraint *was unlimited as to space* as being necessarily unreasonable; and even that a contract restraining one from carrying on his trade, etc., in England was in its nature unreasonable, against public policy, and void. But in the recent English case of *Roussillon* v. *Roussillon,* 14 Ch. D. 351, it was held that a contract unlimited in point of space, whereby the defendant agreed not to establish

himself in the champagne trade, was not, under the circumstances of that trade, unreasonable, and might be enforced. And see now *The Maxim-Nordenfelt Gun Co.* v. *Nordenfelt* [1894] A. C. 549, where it is decided by the House of Lords that a restraint general as to space may be valid, if *reasonable,* under the circumstances of the case, for the protection of the covenantee, provided it is not injurious to the *public* interest.

In the very recent case of *Diamond Match Co.* v. *Roeber,* 106 N. Y. 473 (60 Am. Rep. 464), where a contract was made by the seller with the buyer that he would not at any time within 99 years, directly or indirectly, engage in the manufacture or sale of friction matches (unless as agent of the buyer), in the United States or Territories or the District of Columbia, excepting the State of Nevada and the then Territory of Montana, the court intimated that, if it were necessary, they would hold that a contract in *general* restraint of trade is not *always* and necessarily unreasonable and void; but they said that they were not called on to decide that question, as in the case at bar the exception of Montana and Nevada made the contract in *partial restraint of trade only,* the whole United States in this connection being considered one country. And see *Fowle* v. *Park,* 131 U. S. 88.

35. *What were the precise facts of Waugh* v. *Morris, cited in Clark,* 325-6. The charter-party provided that the cargo (bales of pressed hay) should be taken to the port of London and there *"delivered alongside."* The plaintiff did not agree by the charter-party to *land* it there. Afterwards, landing at Deptford Creek (within port of London) was suggested by the defendant, and assented to by the plaintiff. But when this mode of performance was found to be illegal it was abandoned, and another and legal mode (delivery alongside, followed by exportation) was substituted.

36. *Relief to party to unlawful agreement.* See *Clark,* 336. For full discussion of this subject and a strict application of the maxim *"in pari delicto portior est conditio defendentis,"* see *McMullen* v. *Hoffman,* 174 U. S. 639 (note 26 supra), commenting on the cases of *Brooks* v. *Martin,* 2 Wall. 70, and *Sharp* v. *Taylor,* 2 Phillips, Ch. 801. As to the latter case, see Bisp-

ham's Eq., § 42; 1 Pomeroy, Eq. Jur., p. 442, note 2. As to *Brooks* v. *Martin,* see *Clark,* 337, n. 330.

In *Cardwell* v. *Kelley,* 95 Va. 570, an action was brought by the receiver of an insolvent corporation against a stockholder, to recover a stock subscription for the benefit of creditors whose debts were contracted on the faith of his and other subscriptions. The contract of subscription was lawful on its face, and the creditors had no knowledge of any taint by reason of illegality. The stockholder pleaded that he was allured into making the subscription by the chance of obtaining one or more lots, in a drawing for distribution of lots of unequal value, in the nature of a lottery, contrary to C. V. §§ 3285-'6. The court did not decide whether the scheme amounted to a lottery or not; but held that even if it was illegal, yet the stockholder could not repudiate his contract of subscription as against the creditors of the insolvent corporation. The maxims *'nemo allegans turpitudinem suam audiendus,"* and *"in pari delicto potior est conditio defendentis,"* were discussed by the court; and it was declared that in a case of the nature of that at bar the court will consider whether the good of the public and the policy of the law will be subserved, and the making of such contracts be discouraged, by enforcing the contract, or by refusing to do so; and that to enforce the contract in this case would defeat the illegal purpose of the parties to it, and tend to deter other persons from entering into similar contracts. To refuse to enforce it would encourage the making of such contracts; for if the venture succeeded, the parties would reap the profits; and if it failed, they would suffer no loss. See *Tate* v. *Building Ass'n,* 97 Va. 74.

37. *What is the rule in Virginia as to the application of payments, where no application has been made by either debtor or creditor?* *Clark,* 437-39, citing *Smith* v. *Lloyd,* 11 Leigh (Va.) 512, which followed the law as laid down by the Supreme Court of the United States in the cases quoted from by Clark on p. 408. In *Coles* v. *Withers,* 33 Gratt. 186, it is said by Staples, J.: "This court has repeatedly held that no general rule applicable to every case could be adopted and adhered to without producing great hardships. If neither party has made the application, the court will exercise a sound discretion, and make

the application according to its own notions of what may be right and proper in the particular case." He adds: "It must be admitted that this is a very loose and indefinite way of expressing a principle of law, but it has been declared by very eminent judges." See in accord, *Chapman* v. *Com.,* 25 Gratt. 721.

In *Pope* v. *Transparent Ice Co.,* 91 Va. 79, it is said by Keith, P.: "There is some diversity of authority, as courts have inclined to the common law rule that the application was to be made, where not otherwise directed, in the interest of the creditor, or to the rule of the civil law that, under such circumstances, regard was to be had primarily to the interest of the debtor. The great weight of authority seems to be that in such a case as that now under consideration, where the court has no peculiar fact to aid its discretion, the application must be made to the debt which is least secured, or in other words in the interest of the creditor; and this seems to have been the principle of *Chapman* v. *Com.,* 25 Gratt. 721, where it was applied to the oldest debt, and the law as recognized in *Coles* v. *Withers,* where it is said that in such a case it should be applied to the least secured or most precarious debt." In this case, however, it was immaterial to the debtor to which of the two debts due the same creditor the fund was applied, though it was of vital importance to the creditor. With reference to the endorser of the better secured debt (to which the payment was not applied, but to the other as more precarious) the Court held that in such a case the interest of the endorser (to have the debt on which he is liable discharged) is not to be considered; since to allow the endorser to direct the application of the payment would be inequitable, as this would defeat the end of suretyship, and leave the creditor a loser. And see to the same effect *Coles* v. *Withers,* 33 Gratt. 186.

38. *Is the doctrine of Frost* v. *Knight and Hochster* v. *Delatour, as to "anticipatory breach," law in Virginia? Clark,* 444-7. Yes; see *Burke* v. *Shaver,* 92 Va. 345; *James* v. *Kibler,* 94 Va. 165; and *Lee* v. *Mutual, etc., Life Ass'n,* 97 Va. 160.

In *Burke* v. *Shaver* it is said: "Where one repudiates his promise, and declares that he will not be bound by it, the party not in default need not wait for the time of performance to ar-

rive; and when the engagement is general, need not request the fulfillment of the promise, but may sue at once." Citing 2 Am. & Eng. Ency. Law, 524. And in *Lee* v. *Mutual Life Ass'n,* supra, it is said: "In England and a number of the States of this country, including Virginia, it is held that where there has been a total refusal on the part of one of the contracting parties to perform the contract on his part, the other may elect to sue at once, without waiting for the time of performance to arrive. *James* v. *Kibler,* 94 Va. 165; *Hochster* v. *Delatour,* 2 E. & B. 678. But in order to do this there must be a distinct, unequivocal, and absolute refusal to perform the contract." See *Johnstone* v. *Milling,* 16 Q. B. Div. 460; *Dingley* v. *Oler,* 117 U. S. 490; *Roehm* v. *Horst,* 178 U. S. 1.

39. *Are installment contracts divisible or indivisible? Clark,* 453-6. The doctrine of the Supreme Court of the United States, as laid down in *Norrington* v. *Wright,* 115 U. S. 188 (see also *Cleveland Rolling Mills Co.* v. *Rhodes,* 121 U. S. 254), is that mercantile contracts providing for delivery by installments are *indivisible;* and that a failure to keep the terms of the contract as to any installment discharges the contract, following the English case of *Hoare* v. *Rennie,* 5 H. & N. 19. Thus, in *Norrington* v. *Wright,* it is said by Gray, J. (speaking for the court): "In the contracts of merchants *time is of the essence.* The time of the shipment is the usual and convenient means of fixing the probable time of arrival with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, *a condition precedent* upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." For a case "which lights this doctrine on the outer edge," see *Filley* v. *Pope,* 115 U. S. 213, where the contract was for shipment of 500 tons of pig-iron from Glasgow, Scotland, to New Orleans, and the buyer was discharged from the contract because the seller shipped the iron from Leith, Scotland, though this was done because of the difficulty of obtaining a vessel at Glasgow,

and though the iron arrived at New Orleans sooner than it would have arrived by the first vessel that could have been obtained at Glasgow.

In *Norrington* v. *Wright,* supra, the contract was made in Philadelphia for the sale of "5,000 tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." The sellers shipped 400 tons in February, and 885 tons in March. *Held,* that this was such default on the sellers' part as discharged the buyers. The court said: "The times of shipment as designated in the contract are at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880. These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiences in the shipments during those months to be made up in the month of July."

40. *What were the facts in Bettini* v. *Gye? Clark,* 457-8. In 1 Q. B. D. 188, it is said: "If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had only been for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. As far as we can see, the failure to attend the rehearsals during the six days immediately before the 30th day of March, could only affect the theatrical performances, and perhaps the singing in duets and concerted pieces, during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing rooms and concerts, for fifteen weeks. We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent. The defendant

must, therefore, we think, seek redress by a cross claim for damages."

41. *What is the best definition of a warranty as distinguished from a condition?* See *Clark,* 465; also Anson, page 304, note (a), where it is said that "a warranty is an independent, subsidiary promise, collateral to the main object of the contract." Its breach does not discharge the contract, but gives rise to an action for damages. Thus, on the executed sale of a horse, with warranty of soundness, the breach of the warranty does not authorize the buyer to treat the sale (the main object of the contract) as void. The warranty is collateral to the main object and subsidiary merely; hence the buyer must keep the horse (the title to which has passed to him), and sue the seller for damages for the breach of the warranty.

42. *Is Paradine* v. *Jane now law in Virginia? Clark,* 473-4. No. By Code Virginia, Sec. 2455, it is enacted: "No covenant or promise by a lessee to pay the rent, or that he will leave the premises in good repair, shall have the effect, if the buildings thereon are destroyed by the fire or otherwise without fault or negligence on his part, *or if he be deprived of the possession of the premises by the public enemy,* of binding him to make such payment, or erect such buildings, unless there be other words showing it to be the intent of the parties that he should be so bound." The statute then provides for "a reasonable reduction of the rent," while the tenant is deprived of the premises, or until the buildings destroyed are replaced by others of as much value to the tenant for his purposes as those destroyed.

43. *Does part payment of principal, or payment of interest, remove in Virginia the bar of the Statute of Limitation? Clark,* 496. No; such payment has no effect in Virginia. There must be a promise in writing to pay the debt or such an acknowledgment of the debt in writing that a promise to pay may be inferred therefrom. See *Govcr* v. *Chamberlain,* 83 Va. 286. But part payment of the principal, or payment of interest, is sufficient to remove the bar of the statute in England and in the United States generally.